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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC.,

Petitioner,

v.

TYRONE H. AND DARLENE H. DICKERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether Debtors Tyrone H. and Darlene H. Dickerson ("Debtors") are entitled, pursuant to 11 U.S.C. §§ 506(a) and 1322(b)(2), to "strip off" the second-in-priority lien of Petitioner American General Finance, Inc. when such lien is secured only by a security interest in real property that is the Debtors' principal residence in accordance with the Supreme Court case of *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993).

(2) Whether 42 U.S.C. § 1490a's recapture provisions permit the senior lienholder [the United States Department of Agriculture, Rural Development, formerly known as Farmers Home Administration ("FmHA")] to require the Debtors to repay the interest subsidy provided to them pursuant to federal law upon the filing of a Chapter 13 bankruptcy petition.

PARTIES TO THE PROCEEDING

The caption already contains all parties in this civil action.

CORPORATE DISCLOSURE STATEMENT

COMES NOW American General Finance, Inc. ("American General"), a Delaware corporation, the Petitioner in the above-styled civil action, and pursuant to Rule 29.6 of the Rules of the U.S. Supreme Court hereby certifies that it is the wholly-owned subsidiary of American General Finance Corporation, which is the wholly-owned subsidiary of American General Finance, Inc. (Indiana), which is the wholly-owned subsidiary of American General Corporation, a publicly held company. American General has no subsidiaries that are not wholly owned by it.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American General Finance, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 222 F. 3d 924. It is reprinted in Appendix A ("App A") hereto at page A-1. The order of the court of appeals denying rehearing is not reported. It is reprinted in App A at page A-37. The opinion of the district court is reported at 229 B.R. 539. It is reprinted in App A at page A-7. The opinion of the bankruptcy court is not reported. It is reprinted in App A at page A-18.

JURISDICTION

On August 29, 1997, the U.S. Bankruptcy Court for the Middle District of Georgia orally indicated its findings of fact and conclusions of law and then filed its Order in accordance therewith stripping the lien of American General. On January 27, 1999, after a timely appeal, the U.S. District Court issued an opinion reversing the U.S. Bankruptcy Court. On August 15, 2000, once again after a timely appeal, the 11th Circuit issued an opinion reversing the U.S. District Court and again stripping the lien of-American General. On November 17, 2000, the 11th Circuit denied American General's timely petition

for rehearing. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)..

STATUTES INVOLVED

11 U.S.C. § 506(a) provides in relevant part as follows:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and the proposed disposition of use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 1322(b)(2) provides in relevant part as follows:

> Subject to subsections (a) and (c) of this section, the plan may
>
> * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the Debtors' principal residence, or of holders of

> unsecured claims, or leave unaffected the rights of holders of any class of claims;. . . .

42 U.S.C. § 1490a(a)(1)(D)(i) provides in relevant part as follows:

> With respect to borrowers under section 1472 or 1487 (a) of this title who have received assistance under subparagraph (B) or (C), the Secretary shall provide for the recapture of all or a portion of such assistance rendered upon the disposition or nonoccupancy of the property by the borrower. In providing for such recapture, the Secretary shall make provisions to provide incentives for the borrower to maintain the property in a marketable condition. Notwithstanding any other provision of law, any such assistance whenever rendered shall constitute a debt secured by the security instruments given by the borrower to the Secretary to the extent that the Secretary may provide for recapture of such assistance.

STATEMENT OF THE CASE

I. Basis of Federal Jurisdiction Below

This matter was initiated as a core proceeding in bankruptcy court under 28 U.S.C.A. § 157. American General then appealed under 28 U.S.C.A. § 158 to the United States District Court for the Middle District of Georgia from a final order entered by the Honorable Robert F. Hershner, Jr., Judge of the United States Bankruptcy Court for the Middle District of Georgia, allowing the lien of American General on the residence of Debtors Tyrone H. and Darlene H. Dickerson ("Debtors") to be

stripped off through the Debtors' Chapter 13 Plan. The Honorable Duross Fitzpatrick, Judge of the United States District Court for the Middle District of Georgia, reversed the decision of the bankruptcy court. The Debtors appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. American General cross-appealed an issue left unresolved by the district court's decision. Both the appeal and the cross-appeal invoked the United States Court of Appeals' jurisdiction under 28 U.S.C. § 158 to entertain appeals of judgments that are final decisions of the United States District Court, reversing final decisions of the United States Bankruptcy Court.

II. Course of Proceedings and Disposition in the Courts Below

The Debtors filed their Chapter 13 bankruptcy case in the United States Bankruptcy Court for the Middle District of Georgia on September 27, 1996. American General, holding a second mortgage on the Debtors' residence, filed a proof of claim indicating that it held a secure claim. On January 31, 1997, the Debtors filed a Complaint against American General seeking to change the status of American General's claim from secured to unsecured. American General filed answers to the original complaint and to the amended complaint requesting that the prayers in the complaint be denied, that the adversary proceeding be dismissed, and that the amended complaint be dismissed. Bankruptcy Judge Robert F. Hershner then held a bench trial on August 27, 1997. On or about August 29, 1997, Judge Hershner entered an order finding American General's lien to be unsecured and

allowing the lien to be stripped off through the Debtors' Chapter 13 Plan. On or about September 8, 1997, American General filed a notice of appeal of Judge Hershner's decision to the United States District Court for the Middle District of Georgia, Macon Division.

On or about January 27, 1999, Judge Duross Fitzpatrick of the United States District Court for the Middle District of Georgia entered an order reversing the judgment of the bankruptcy court. On or about February 16, 1999, the Debtors filed a notice of appeal of Judge Fitzpatrick's decision to the United States Court of Appeals for the Eleventh Circuit. On or about February 23, 1999, American General filed a notice of cross-appeal of Judge Fitzpatrick's decision to the United States Court of Appeals for the Eleventh Circuit seeking resolution of an issue left unresolved by the district court. The Honorable Stanley F. Birch, Jr., the Honorable Peter Thorp Fay, and the Honorable Paul Hitch Roney of the court of appeals entered judgment on August 15, 2000, reversing the district court's order and remanding the matter for entry of a judgment in favor of the Debtors. The court of appeals denied American General's timely petition for rehearing on November 17, 2000.

III. Statement of Facts

On or about June 21, 1985, the Debtors purchased real estate known as 50 Fallin Street, Thomaston, Georgia 30286. The property has been the Debtors' personal residence since that date. The United States Department of Agriculture, Rural Development, formerly known as Farmers Home Administration (herein collectively referred to as "FmHA"), financed the Debtors' purchase

of the home. FmHA holds a first mortgage on the property by virtue of a security deed dated June 21, 1985. This security deed is recorded at Deed Book 310, Page 503, Upson County, Georgia Records. The Debtors signed a promissory note with FmHA as payee on June 21, 1985, for the principal amount of $38,150.00. The Debtors have maintained timely payments in the amount set by the FmHA note since June 21, 1985.

On February 22, 1996, the Debtors applied for credit with American General and submitted a loan application to American General indicating that FmHA held a first mortgage on their personal residence. On February 22, 1996, FmHA informed American General that the payoff on the first mortgage was $14,558.00. Based on this information, American General advanced $20,000.00 to the Debtors. The Debtors executed a promissory note with American General as payee. The terms of the note call for 180 monthly payments of $309.09. The final payment under the note is to be made on February 22, 2011.

As collateral for the loan, the Debtors granted American General a security interest in their personal residence. American General perfected its security interest in the Debtors' residence by filing a security deed. The deed is recorded at Deed Book 526, Page 240, Upson County, Georgia Records. At the time of the loan, American General obtained an appraisal of the Debtors' personal residence valuing the property at $54,000.00.

The Debtors filed for relief under 11 U.S.C. Chapter 13 on September 27, 1996. At the time of the filing, the Debtors were current with their payments to both FmHA and American General. The Debtors' Chapter 13 plan proposed to make the regular monthly payments to both

FmHA and American General outside of the Chapter 13 plan. On October 31, 1996, FmHA filed a Proof of Claim in the amount of $59,889.74. On November 13, 1996, American General filed a Proof of Claim in the amount of $21,432.06. Each Proof of Claim asserted that the claimed interest is secured.

The Honorable Robert F. Hershner, Judge of the United States Bankruptcy Court for the Middle District of Georgia, found that the Proof of Claim filed by FmHA accurately reflected the Debtors' obligation to FmHA as of September 27, 1997, the date of the bankruptcy filing. Judge Hershner further held that the Debtors' personal residence was worth no more than $56,000. Judge Hershner did not determine the actual value of the Debtors' residence because, subtracting the amount of FmHA's claim from the highest possible value of the residence, he found no equity remaining in the property to secure American General's lien. Applying 11 U.S.C. §§ 506(a) and 1322(b)(2), Judge Hershner ruled that the Debtors were entitled to strip off American General's lien against the Debtors' principal residence. The Honorable Duross Fitzpatrick, Judge of the United States District Court for the Middle District of Georgia, reversed Bankruptcy Judge Hershner's order, holding, pursuant to the anti-modification provisions of 11 U.S.C. § 1322(b)(2), that the Debtors were not entitled to strip off American General's lien against the Debtors' principal residence, regardless of whether any equity in the property exists to secure the lien. District Judge Fitzpatrick did not address American General's claim that the claim filed by FmHA, and accepted by the bankruptcy court, reflected a misinterpretation of 42 U.S.C. § 1490a's recapture provisions, thus artificially inflating FmHA's claim. If the statute

were properly applied, American General argued, American General's lien would be fully secured.

The Honorable Stanley F. Birch, Jr., the Honorable Peter Thorp Fay, and the Honorable Paul Hitch Roney of the United States Court of Appeals for the Eleventh Circuit reversed the district court's order and remanded the matter for entry of judgment in favor of the Debtors. Judge Birch, writing the opinion for the panel, took notice as a preliminary matter that "[t]he district court noted that there had been a split among bankruptcy courts, district courts and bankruptcy scholars regarding the interpretation of the Supreme Court's holding in *Nobelman v. American Savings Bank*, and its application to the question of whether creditors whose claims are wholly unsecured pursuant to § 506(a) were entitled to the protection provided under § 1322(b)(2)." *Am. Gen. Fin., Inc. v. Dickerson* (*In Re Dickerson*), 222 F. 3d 924, 925 (11th Cir. 2000) (internal citations omitted).

The court further held that the "recently announced decision of *In Re Tanner*, 217 F. 3d 1357 (11th Cir. 2000), controls the disposition of the case now before us." *Dickerson*, 222 F. 3d at 926. *Tanner* was decided after the district court rendered its opinion in the case at bar. The Eleventh Circuit panel considering the case at bar held, "a panel of this court considered the interplay between sections 506(a) and 1322(b)(2) of the Bankruptcy Code," the same issue that is raised in the case at bar, "and determined that creditors whose liens are wholly unsecured under section 506(a) are not entitled to the protection of section 1322(b)(2) even if their claim was secured solely by a lien on the debtors' principal residence." *Dickerson*, 222 F. 3d at 926. "Therefore," the court held, "it is now the rule within this circuit that section

1322(b)(2) of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence." *Id.* Applying this rule, the court found that American General's lien against the Debtors' principal residence "is not entitled to protection against modification under section 1322(b)(2)." *Id.* "Therefore," the court held, "the Debtors may strip [American General's] lien against their residence." *Id.*

The court went on to state that:

> However, were we to decide this issue on a clean slate, we would not so hold. We find persuasive the district court's reasoning that providing "anti-modification" protection to junior mortgages where the value of the mortgaged property exceeds the senior mortgagee's claim by at least one cent, as prescribed by the Supreme Court's decision in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), but denying that same protection to junior mortgagees who lack that penny of equity, places too much weight upon the valuation process.

Dickerson, 222 F. 3d at 926.

The court explained its reasoning as follows:

> As we have noted, "[v]aluation outside the actual market place is inherently inexact." Given the unavoidable imprecision and uncertainty of the valuation process, we think that choosing to draw a bright line at this point is akin to attempting to draw a bright line in the fog. Moreover, we believe that Congress's use of the phrase "a claim secured only by" instead of the term "secured claim" to describe those claims which could not be modified in a Chapter 13

> bankruptcy plan supports the conclusion that the "anti-modification" protection of § 1322(b)(2) should extend to all claims secured solely by the debtor's principal residence, not just those junior homestead mortgages where there is sufficient equity in the subject property to support both the entire senior and part of the junior homestead mortgages.

Dickerson, 222 F. 3d at 926 (internal citations omitted). The court of appeals, like the district court, failed to address the FmHA interest recapture issue.

REASONS FOR GRANTING THE PETITION

As to the lien-stripping issue, as the court of appeals acknowledged below, a number of district court opinions reflect what the court of appeals found to be the better-reasoned approach. This approach would protect from modification the claims of wholly undersecured secondary mortgagees. At the same time, however, the holdings of the other circuit courts of appeals that have decided this issue are in accord with *Tanner*, the Eleventh Circuit decision to which the panel considering the case at bar found itself duty-bound to adhere. These cases have allowed Chapter 13 debtors to strip off the liens of wholly undersecured secondary mortgagees. The application of the *Nobelman* decision thus turns on the existence of a mere penny in equity. This case presents a timely opportunity for this Court to clarify this issue. The large volume of reported decisions on point, many of which are cited below, suggests both the importance of this issue to the field of bankruptcy law and the strong likelihood, if

not certainty, that the issue will continue to be a source of confusion if this Court declines to provide clarification at this time.

In addition, as to the interest subsidy recapture issue, the bankruptcy court has made law on an important federal issue that requires this Court's attention. Because the bankruptcy court's decision extends 42 U.S.C. § 1490a's recapture provision beyond the bounds recognized by previous case law and because there is so little guidance on point, this issue, as well, provides an opportunity for this Court to provide much-needed direction.

I. The Lien-Stripping Issue

The first issue presented by this case involves "lien stripping" in Chapter 13 cases and the interplay between 11 U.S.C. §§ 506(a) and 1322(b)(2). Section 506(a) provides, in pertinent part, as follows:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Section 1322(b)(2) provides as follows:

> Subject to subsections (a) and (c) of this section, the plan may
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> * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

This Court's landmark decision regarding this issue is *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). In *Nobelman*, addressing a Chapter 13 debtors' attempt to bifurcate and cramdown an undersecured residential mortgage, reducing the mortgage to the fair market value of their residence, the majority held that "to give effect to § 506(a)'s valuation and bifurcation in the manner the petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, **the lender's claim is secured only by a lien on the debtor's principal residence**." *Id.* at 331 (emphasis added.) In his concurrence, Justice Stephens held that, as the legislative history of 1322(b)(2) indicated, "favorable treatment of residential mortgages was intended to encourage the flow of capital into the home lending market." *Id.* at 322, *citing Grubbs v. Houston First Am. Sav. Ass'n*, 730 F. 2d 236, 245-46 (5th Cir. 1984). Justice Stephens concluded that "[i]t therefore seems quite clear that the Court's literal reading of the text of the statute [11 U.S.C. § 1322(b)(2)] is faithful to the intent of Congress." *Nobelman*, 508 U.S. at 332.

In declining to allow the bifurcation and cramdown the Debtors requested, the *Nobelman* Court focused on the "rights of holders" of liens secured by the Debtors' principal residence. *Id.* at 328-330. Because "the term 'rights' is nowhere defined in the Bankruptcy Code," the *Nobelman* court "assume[d] that Congress has 'left the determination of property rights in the assets of a bankrupt's estate to state law,' since such property interests are created and defined by state law." *Id.* at 329, *citing Butner v. United States*, 440 U.S. 48, 54-55 (1992). The Court further recognized that the "justifications for application of state law are not limited to ownership interests," but "apply with equal force to security interests, including the interest of a mortgagee." *Nobelman*, 508 U.S. at 329, *citing Butner*, 440 U.S. at 55.

The Court then addressed the bank's rights as set forth in the mortgage instrument. Those rights included, as they do in this case, "the right to repayment of the principal in monthly installments over a fixed term at [a] specified . . . rate . . . of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against [the Debtors'] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure." *Nobelman*, 508 U.S. at 329. The Court noted that "[t]hese are the rights that were 'bargained for by the mortgagor and the mortgagee' . . . and are rights protected from modification by § 1322(b)(2)." *Id.* at 329-30, *citing Dewsnup v. Timm*, 502 U.S. 410, 417 (1992).

In considering the interplay between the rights protected by § 1322(b)(2) and the bifurcation and cramdown permitted by § 506(a), the *Nobelman* court rejected the

"rule of the last antecedent." *Nobelman*, 508 U.S. at 330. This rule would provide "§ 1322(b)(2)'s protection . . . only to that subset of allowed 'secured claims,' determined by application of § 506(a), that are secured by a lien on the debtor's home." *Id.* The Court rejected this rule as "quite sensible as a matter of grammar . . . but . . . not compelled." *Id.* Instead, the Court held that the phrase "claim . . . secured only by a lien" encompassed "both the secured and unsecured components" of a lien encumbering property that is the debtor's principal residence. *Id.* at 331.

Nobelman does not, however, address the application of 11 U.S.C. §§ 506(a) and 1322(b)(2) to cases in which junior mortgages on primary residences are wholly undersecured. Consequently, the courts of appeals and district courts have split on the issue. The majority of courts have held that, when the claim of a subordinate lienholder is totally undersecured, the subordinate lien is not subject to the antimodification language of 11 U.S.C. § 1322(b)(2) and may therefore be stripped off. *See, e.g., Tanner v. FirstPlus Fin., Inc.* (*In Re Tanner*), 217 F. 3d 1357, 1359-60 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n* (*In Re Bartee*), 212 F. 3d 277, 295 (5th Cir. 2000); *McDonald v. Master Fin., Inc.* (*In Re McDonald*), 205 F. 3d 606, 611 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 66 (2000). A host of district court opinions are in accord with these courts of appeals. Perhaps the most comprehensive survey of these decisions is to be found in *Bartee*, 212 F. 3d at 289, and, in the interest of brevity, American General will not reproduce the list here. Finally, the United States Bankruptcy Appellate Panels of the First Circuit, in *Domestic Bank v. Mann* (*In Re Mann*), 249 B.R. 831, 836-37

(B.A.P. 1st Cir. 2000), and of the 9th Circuit, in *Lam v. Investors Thrift*, 211 B.R. 36 (B.A.P. 9th Cir. 1997), adopted the majority view as well.

The Eleventh Circuit opinion in *Tanner*, 217 F. 3d at 1359-60, is typical of those courts standing for the majority interpretation. The *Tanner* court observed, as a preliminary matter, as follows:

> The majority view has focused on the following language [in *Nobelman*] to support its conclusion that the antimodification provision protects only undersecured, and not wholly unsecured, homestead lenders: "even if we accept petitioners' valuation [under section 506(a)], the bank is still the 'holder' of a 'secured claim,' because petitioners' home retains $23,500 of value as collateral." Under this view, the antimodification protection afforded by section 1322(b)(2) applies only when the creditor's claim is at least partially secured.

Tanner, 217 F. 3d at 1359 (internal citations omitted), *citing Nobelman*, 508 U.S. at 329. The *Tanner* court went on to hold as follows:

> Although this is a close issue, we find the reasoning of the Third and Fifth Circuits [in *McDonald* and *Bartee*, respectively] persuasive and adopt the majority view. We agree with those courts that the only reading of both sections 506(a) and 1322(b)(2) that renders neither a nullity is one that first requires bankruptcy courts to determine the value of the homestead lender's secured claim under section 506(a) and then to protect from modification any claim that is secured by any amount of collateral in the residence. Any claim that is wholly unsecured,

> however, would not be protected from modification under section 1322(b)(2). To hold otherwise and extend the antimodification clause to even wholly unsecured claims would vitiate the *Nobelman* Court's pronouncement that "[debtors] were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim."

Tanner, 217 F. 3d at 1359-60 (internal citations omitted), *citing Nobelman*, 508 U.S. at 328; *McDonald*, 205 F. 3d at 611; *Bartee*, 212 F. 3d at 290.

Although in the minority, a number of courts have held that, regardless of whether equity exists in a debtor's principal residence, no lien secured only by such residence may be stripped or modified. *See, e.g., In Re Boehmer*, 240 B.R. 837, 841 (Bankr. E.D. Pa. 1999); *In Re Perkins*, 237 B.R. 658, 660-61 (Bankr. S.D. Ohio 1999); *In Re Lewandowski*, 219 B.R. 99, 103 (Bankr. W.D. Pa. 1998); *In Re Bauler*, 215 B.R. 628, 632 (Bankr. D.N.M. 1997); *In Re Robinson*, 231 B.R. 30, 34 (Bankr. D.N.J. 1997); *In Re Mattson*, 210 B.R. 157, 158 (Bankr. D. Minn. 1997); *In Re Shandrew*, 210 B.R. 829, 831-33 (Bankr. E.D. Cal. 1997); *Fraize v. Beneficial Mortgage Corp. (In Re Fraize)*, 208 B.R. 311, 312-313 (Bankr. D.N.H. 1997); *Barnes v. Am. Gen. Fin. (In Re Barnes)*, 207 B.R. 588, 593 (Bankr. N.D. Ill. 1997); *In Re Barnes*, 199 B.R. 256, 258 (Bankr. W.D.N.Y. 1996); *In Re Witt*, 199 B.R. 890, 895 (W.D. Va. 1996); *In Re Neverla*, 194 B.R. 547, 549-550 (Bankr. W.D.N.Y. 1996); *In Re Johnson*, 160 B.R. 800, 803 (Bankr. S.D. Ohio 1993). In addition, the Eleventh Circuit panel that heard the case at bar expressly stated that, were it not bound by prior Eleventh Circuit precedent that was decided a mere month prior, it would follow this line of cases as well. *See Dickerson v.*

Am. Gen. Fin., Inc. (*In Re Dickerson*), 222 F. 3d 924, 926 (11th Cir. 2000).

Barnes v. American General Finance (*In Re Barnes*), 207 B.R. 588 (Bankr. N.D. Ill. 1997) is typical of those cases espousing the minority rule. The *Barnes* court cited with approval the opinion of the United States Bankruptcy Court for the District of New Jersey in *In Re Jones*, 201 B.R. 371, 373-74 (Bankr. D.N.J. 1996), which held as follows:

> Rather than relying on dicta in *Nobelman*, *Jones* held that the proper reading of that opinion was as an endorsement of creditor rights, where "rights" were defined by state law and the underlying mortgage contract. A court analyzing a "stripoff" situation in Chapter 13, therefore, should look first to whether the creditor holds a mortgage secured only by the debtor's principal residence. If so, the creditor's rights under § 1322(b)(2) may not be modified regardless of the presence or absence of underlying equity in the residence, and there is no right to look to § 506(a) for valuation. A mortgage stripoff epitomizes a modification of creditor rights and is not allowed in Chapter 13 under § 1322(b)(2) and *Nobelman*.

Barnes, 207 B.R. at 592 (internal citations omitted), *citing Jones*, 201 B.R. at 373-74. The *Barnes* court went on to criticize those decisions that have focused on the statement in *Nobelman* "even if we accept petitioners' valuation . . . the bank is still the 'holder' of a 'secured claim', because petitioners' home retains $23,500 of value as collateral." The *Barnes* court then held as follows:

> Reliance on the "still the holder" dicta in *Nobelman* yields an absurd result. If § 1322(b)(2)'s protection against modification were limited solely to security interests with underlying collateral, junior mortgagees with a single penny of equity in collateral in the debtor's principal residence would still retain complete protection from a stripdown while junior mortgagees who lacked that penny of equity would find their entire claim stripped off. *Nobelman* did not foster this absurd result because that decision did not delineate that any level of equity protecting the secured creditors is required for § 1322(b)(2) protection. Instead, *Nobelman* flatly held that "[s]ection 1322(b)(2) prohibits [a § 506(a)] modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence."

Barnes, 207 B.R. at 593 (internal citations omitted), *citing Nobelman*, 508 U.S. at 332. "Moreover," the *Barnes* court held, "the Debtors' argument would make a mockery of the Chapter 13 Plan confirmation process and would make their commitments to secured creditors at the time of confirmation wholly contingent on future fluctuations of the collateral market value." 207 B.R. at 593.

Thus, district courts and courts of appeals have considered the application of the same language in *Nobelman* to cases involving holders of totally undersecured liens on the primary residences of Chapter 13 debtors and have reached completely opposite conclusions. The proliferation of reported case law in this area demonstrates both the importance of this issue to the field of bankruptcy law and the fact that the law in this area is likely, if not

certain, to remain confused absent direction from this Court.

II. The Interest Subsidy Recapture Issue

Even if 11 U.S.C.A. § 1322(b) would allow a fully undersecured mortgage to be stripped in a Chapter 13 bankruptcy case (a point American General has disputed throughout this litigation), the only way to find that American General holds a wholly undersecured lien in the case at bar is to allow FmHA to recapture, through the Chapter 13 claims process, the interest subsidy it provided to the Debtors. Although neither the district court nor the court of appeals addressed this issue squarely, the holding of the bankruptcy court indicates that it so applied relevant federal law.

The relevant date for determining the value of a creditor's claim is the date of commencement of the bankruptcy case. *Scheuer v. Marine Midland Bank, N.A.*, 213 B.R. 415 (Bankr. N.D.N.Y.) The lien superior to American General's was a subsidized loan held by the United States Department of Agriculture, Rural Development. For the purposes of this brief, American General will refer to the senior lienholder as "FmHA." The total secured amount FmHA claimed in its proof of claim was $59,889.74. Judge Hershner based his decision on this amount, which he found fairly represented the amount of FmHA's secured claim. Of this amount, $30,843.68 was principal, $76.90 was unpaid and accrued interest, $24,552.00 was interest credit subject to recapture under 42 U.S.C. § 1490a(a)(1)(D), and $4,417.16 was principal reduction attributed to the subsidy.

Although American General does not dispute the principal and interest amounts, the bankruptcy court's inclusion, in FmHA's secured claim, of interest credit subject to recapture and principal reduction attributed to subsidy, constitutes an expansion of relevant federal law in a manner that American General believes requires this Court's attention and direction. The inclusion of these sums, totaling almost $29,000, is critical to the outcome of the case at bar because, were these sums subtracted from senior lienholder FmHA's secured claim, the claim of junior lienholder American General would be fully secured. Were this the case, of course, the preceding discussion of the interplay between 11 U.S.C. §§ 506(a) and 1322(b)(2) would be unnecessary.

The statute controlling interest credit recapture is 42 U.S.C.A. § 1490a(a)(1)(D), which states as follows:

> With respect to borrowers under section 1472 or 1487(a) of this title who have received assistance under subparagraph (B) or (C), the Secretary shall provide for the recapture of all or a portion of such assistance rendered upon the **disposition** or **nonoccupancy** of the property by the borrower. In providing for such recapture, the Secretary shall make provisions to provide incentives for the borrower to maintain the property in a marketable condition. Notwithstanding any other provision of law, any such assistance whenever rendered shall constitute a debt secured by the security instruments given by the borrower to the Secretary to the extent that the Secretary may provide for recapture of such assistance.

(Emphasis added.) The plain text of the statute states that recapture is available only upon "disposition or nonoccupancy" of the Debtors' property. It is undisputed in the case at bar that the Debtors have neither disposed of nor stopped occupying the property that is the subject of this litigation. The bankruptcy court's interpretation of the statute as allowing recapture upon the filing of a Chapter 13 petition is, therefore, not supported by the statute's own text.

In addition, of the only two cases that have ever addressed this specific subsection, neither involved a bankruptcy matter. Thus, neither the plain text of the statute nor the case law construing the statute supports the bankruptcy court's interpretation. The cases that have interpreted § 1490a(a)(1)(D) to date are as follows: *Allen v. United States Dep't of Agric., Farmers Home Admin.*, 698 F. Supp. 669 (S.D. Miss. 1988) and *United States v. Wheeler*, 726 A.2d 1264 (Me. 1999). In *Allen*, the borrowers sued FmHA challenging the requirement that the debtors repay their interest subsidies at the same time as they paid off their subsidized mortgage. In ruling against the debtors, the Court focused on the Subsidy Repayment Agreement signed by the borrowers. Certain language in the Agreement allowed FmHA to recapture the subsidy "when the loan account is satisfied by payment in full or is assumed by another person(s), the property is sold, or is no longer occupied by the borrower(s)." *Id.* at 670. In *Wheeler*, as in *Allen*, the lower court focused on the Subsidy Repayment Agreement signed by the borrowers and found that FmHA could not recapture interest upon foreclosure because no such provision was found in the Subsidy Repayment Agreement. *Wheeler*, 726 A.2d at 1267.

Although the appellate court in *Wheeler* correctly determined that a foreclosure is a transfer and disposition of the property that allows for recapture, the critical part of both cases is the courts' reliance upon the parties' Subsidy Repayment Agreement in determining whether recapture was available.

In the case at bar, the Subsidy Repayment Agreement between FmHA and the Debtors does not provide for the recapture of the subsidy upon the filing of a Chapter 13 bankruptcy petition. It is therefore clear that the bankruptcy court, in allowing recapture through the Chapter 13 claims process, has extended § 1490a(a)(1)(D)'s recapture provisions in a manner beyond the contemplation of the statute, relevant case law, and the parties' Subsidy Repayment Agreement.

CONCLUSION

The first issue American General presented in this petition for certiorari demonstrated the importance of claim valuation in the context of Chapter 13 petitions involving junior residential liens that are, or may be, totally undersecured. The second issue demonstrates the manner in which one bankruptcy judge's expansive reading of FmHA's recapture rights may generate further controversy in this same area. Each issue represents an important and timely opportunity for this Court to provide much-needed direction.

WHEREFORE, American General respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted this 15th day of February, 2001.

AMERICAN GENERAL FINANCE, INC.

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APPENDIX

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8184

D.C. Docket No. 97-00703-5-CV-1 DF
(Filed August 15, 2000)

In re: TYRONE H. DICKERSON and
DARLENE H. DICKERSON,

Debtor.

AMERICAN GENERAL FINANCE, INC.,
Plaintiff-Appellee-Cross-Appellant,

versus

TYRONE H. DICKERSON and
DARLENE H. DICKERSON,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Middle District of Georgia

(August 15, 2000)

Before BIRCH, RONEY and FAY, Circuit Judges.

BIRCH, Circuit Judge:

Tyrone and Darlene Dickerson (the "Debtors") appeal the district court's judgment, which reversed the bankruptcy court's order finding that American General

Finance Inc.'s ("AGF's") lien against the Debtors' principal residence was unsecured and that the Debtors were entitled to strip AGF's lien against their residence. The bankruptcy court concluded that, because there was inadequate equity in the Debtors' residence to secure AGF's lien, AGF's claim would be considered an unsecured claim in the debtors' Chapter 13 bankruptcy proceeding.[1] The bankruptcy court further concluded that, as a wholly unsecured lien, AGF's lien was not entitled to the protection against modification afforded under 11 U.S.C. § 1322(b)(2) to the holders of claims secured solely by the debtors' principal residence. The district court reached the opposite conclusion and determined that, although AGF's lien would be treated as a wholly unsecured claim pursuant to 11 U.S.C. § 506(a), it remained entitled to the special "anti-modification" protection provided to creditors whose claims are secured only by a lien on the debtor's principal residence under § 1322(b)(2).[2]

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[1] The bankruptcy court did not determine the actual value of the debtors' residence but, instead, determined that the highest possible value was $56,000, the highest value offered at trial. The residence was encumbered by a first mortgage held by Farmers Home Administration ("FHA") and a second mortgage held by AGF. FHA filed a proof of claim in the amount of $59,889.74, and AGF filed a proof of claim in the amount of $21,432.06.

[2] The district court noted that there had been a split among bankruptcy courts, district courts and bankruptcy scholars regarding the interpretation the Supreme Court's holding in *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993), *superseded in part by statute on other grounds as stated in In re Tanner*, ___ F.3d ___, ___ n.5 (11th Cir.2000), and its application to the question of whether creditors whose claims are wholly unsecured pursuant to

This court's recently announced decision in *In re Tanner*, ___ F.3d ___ (11th Cir., July 13, 2000), controls the disposition of the case now before us. In *In re Tanner*, a panel of this court considered the interplay between sections 506(a) and 1322(b)(2) of the Bankruptcy Code and determined that creditors whose liens are wholly unsecured under § 506(a) are not entitled to the protection of § 1322(b)(2) even if their claim was secured solely by a lien on the debtors' principal residence. *See* ___ F.3d at ___. Therefore, it is now the rule within this circuit that § 1322(b)(2) of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence according to § 506(a). Applying this rule, we conclude that AGF's lien against the Debtors' principal residence is unsecured and, accordingly, is not entitled to protection against modification under § 1322(b)(2). Therefore, the Debtors may strip AGF's lien against their residence.

However, were we to decide this issue on a clean slate, we would not so hold. We find persuasive the district court's reasoning that providing "anti-modification" protection to junior mortgagees where the value of the mortgaged property exceeds the senior mortgagee's claim by at least one cent, as prescribed by the Supreme

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§ 506(a) were entitled to the protection provided under § 1322(b)(2). The district court reasoned that the language of § 1322(b)(2), the Supreme Court's interpretation of § 1322(b)(2) in *Nobelman*, and the uncertainty inherent in establishing a value for a debtor's residence supported the conclusion that § 1322(b)(2) protects all claims secured only by the debtor's principal residence, even if such a claim would be considered unsecured under a § 506(a) valuation.

Court's decision in *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993), but denying that same protection to junior mortgagees who lack that penny of equity, places too much weight upon the valuation process. As we have noted "[v]aluation outside the actual market place is inherently inexact." *Rushton v. Commissioner of Internal Revenue*, 498 F.2d 88, 95 (5th Cir. 1974). Given the unavoidable imprecision and uncertainty of the valuation process, we think that choosing to draw a bright line at this point is akin to attempting to draw a bright line in the fog. Moreover, we believe that Congress's use of the phrase "a claim secured only by" instead of the term "secured claim" to describe those claims which could not be modified in a Chapter 13 bankruptcy plan supports the conclusion that the "anti-modification" protection of § 1322(b)(2) should extend to all claims secured solely by the debtor's principal residence, not just those junior homestead mortgages where there is sufficient equity in the subject property to support both the entire senior and part of the junior homestead mortgages. *See* 11 U.S.C. § 1322(b)(2); *see also United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself.").

Nonetheless, under the prior precedent rule we must apply the rule established by this court in *In re Tanner*, ___ F.3d ___ (11th Cir. July 13, 2000) (holding that § 1322(b)(2) of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence according to § 506(a)). Accordingly, we REVERSE the district court's order and REMAND for entry of judgment in favor of the Debtors.

United States Court of Appeals
For the Eleventh Circuit

No. 99-8184

District Court Docket No. 97-00703-5-CV-1

(Filed Aug. 15, 2000)

In re: TYRONE H. DICKERSON and DARLENE H. DICKERSON,

Debtor.

AMERICAN GENERAL FINANCE, INC.,

Plaintiff-Appellee-Cross-Appellant,

versus

TYRONE H. DICKERSON and
DARLENE H. DICKERSON,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Middle District of Georgia

Before BIRCH, RONEY and FAY, Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for entry of judgment in favor of the Debtors in accordance with the opinion of this Court;

IT IS FURTHER ORDERED THAT plaintiff-appellee-cross-appellant pay to defendants-appellants-cross-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: August 15, 2000
For the Court:
Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: NOV 28 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

AMERICAN GENERAL FINANCE, INC.,	:	
Appellant,	:	**5:97-CV-703-1(DF)**
vs.	:	**(Filed Jan. 27, 1999)**
TYRONE H. DICKERSON and DARLENE H. DICKERSON,	:	
Appellees.	:	

FITZPATRICK, District Judge.

Before the Court is an appeal by American General Finance, Inc. from the August 29, 1997 order by the United States Bankruptcy Court for the Middle District of Georgia (Hershner, J.). For the reasons stated herein, the Bankruptcy Court's order is reversed.

BACKGROUND

Tyrone and Darlene Dickerson ("the debtors"), Appellees herein, purchased a parcel of land in Thomaston, Georgia, on which their principal residence is located, in June 1985. They financed the purchase of the home with a loan from Rural Development, formerly known as Farmers Home Administration ("FHA"), in the amount of $38,150. FHA holds a first mortgage on the property by virtue of a security deed. In February 1996, the debtors obtained a loan from American General ("AG"), Appellants herein, in the amount of $20,000, based on the payoff of the first mortgage of $14,558; the

debtors granted a security interest in their personal residence in favor of AG, which AG properly perfected.

On September 27, 1996, the debtors filed for relief under Chapter 13 of the Bankruptcy Code. At that time, the debtors were current with their payments to both FHA and AG. The debtors' Chapter 13 plan proposed to make the regular monthly payments to both FHA and AG outside of their Chapter 13 plan. On October 31, 1996, FHA filed a proof of claim in the amount of $59,889.74,[1] and on November 13, 1996, AG filed a proof of claim in the amount of $21,432.06.

On January 31, 1997, the debtors filed a complaint against AG seeking to change the status of AG's claim from secured to unsecured. A trial was held on August 27, 1997, before Judge Hershner. Judge Hershner found that the proof of claim filed by FHA was accurate. While he did not determine the actual value of the debtors' residence, he determined that the highest possible value was $56,000, the highest value offered at trial. Using the amount that the debtors owed to FHA and the highest possible value of the property, he determined that there was no equity in the property beyond FHA's claim. Therefore, he found that AG's lien was unsecured and the debtors were entitled to strip AG's lien against the

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[1] The original amount that FHA loaned to the debtors was $38,150 with an interest rate of 11 3/8 % per year. Because of government subsidization, the debtors' monthly payment was only $163.00; thus, although interest on the loan was accruing at a rate of over $4,000 per year, the debtors were only paying less than $2,000 per year. Therefore, the amount of the debt increased, and when the debtors filed for bankruptcy protection, the amount of debt owed to FHA was $59,889.74.

residence.[2] Presently pending before the Court is AG's appeal of the Bankruptcy Court's decision.

STANDARD OF REVIEW

In reviewing a decision of a bankruptcy court, the district court must accept the bankruptcy judge's findings of fact unless they are clearly erroneous. Fed.Bankr.R. 8013; ***In re Chase & Sanborn Corp.***, 904 F.2d 588, 593 (11th Cir. 1990). A bankruptcy court's conclusions of law, on the other hand, are subject to *de novo* review. *Id.*

DISCUSSION

The issue raised in this appeal is whether § 1322(b)(2) of the Bankruptcy Code permits the debtors to treat AG as wholly unsecured pursuant to § 506(a) and thus avoid AG's mortgage lien.

Under Chapter 13 of the Bankruptcy Code, debtors may adjust their debt through a repayment plan approved by the Bankruptcy Court. Section 506(a) limits a creditor's secured claim to the value of its collateral:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

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[2] Lien stripping occurs when a debtor avoids the lien of a lender who's claim is unsecured.

11 U.S.C. § 506(a). This section normally allows a debtor to divide a creditor's claims into secured and unsecured components according to the value of the collateral. To the extent that a secured creditor holds a claim in excess of the value of the property, that surplus is deemed to be unsecured. Section 1322(b)(2) allows debtors to modify the rights of both secured and unsecured creditors, but the section provides a special protection for creditors whose claims are secured only by a lien on the debtor's principal residence. Section 1322(b)(2) states that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1322(b)(2).

In ***Nobelman v. American Savings Bank***, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), a unanimous Supreme Court settled the conflict between § 1322(b)(2) and § 506(a) and addressed whether a debtor could divide a creditor's claim into secured and unsecured components if the claim was secured only by the debtor's principal residence. In *Nobelman*, the debtors had a first mortgage on their residence of approximately $71,000, while the parties stipulated that the value of the residence was merely $23,500. The debtors proposed to make payments on the mortgage only up to the value of the residence and treat the remainder of the claim as unsecured. The creditor objected, arguing that bifurcating the claim into secured and unsecured claims would violate § 1322(b)(2). The debtors, on the other hand, argued that the protection of § 1322(b)(2) applies only to

the extent that the creditor held a secured claim in the residence.

The Court held that § 1322(b)(2) prohibited the debtor from stripping the creditor's claim, because although it was undersecured, it was still a secured claim to the extent of the value of the property. The Court stated that it was appropriate for the debtors to look to § 506(a) to determine the status of the creditor's secured claim; but, even though the portion of the creditor's claim that exceeded the value of the collateral would be considered unsecured under § 506(a), it did not mean that the rights that the creditor enjoyed as a mortgagee were limited by the valuation of its secured claim. *Id.*, 508 U.S. at 329, 113 S.Ct. at 2110. The Court interpreted the statement in § 1322(b)(2) that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence," as not applying exclusively to those claims that are secured pursuant to valuation under § 506(a). The debtors had argued that because the clause prohibiting modification of homestead liens came immediately after the term "secured," that Congress intended for only secured claims, as opposed to unsecured claims, to be protected by § 1322(b)(2). The Court rejected this argument and found that, while such a reading of the statute was sensible, it was not compelled. Instead of using the phrase "claim secured . . . by," Congress could have repeated the term "secured claim." *Nobelman*, 508 U.S. at 330-31, 113 S.Ct. at 2110-11. By choosing not to use the term of art "secured claim," the Court inferred that Congress intended to use the term "claim" in the ordinary sense, defined by the Bankruptcy

Code as including any "right to payment, whether . . . secured or unsecured." 11 U.S.C. § 101(5). Based on this reasoning, the Court found it plausible to read the phrase prohibiting modification of homestead liens "as referring to the lienholder's entire claim, including both the secured and unsecured components of the claim." *Id.* at 331, 113 S.Ct. at 2111. Justice Stevens wrote a concurring opinion, noting that the apparent conflict in the Code sections was explained by the legislative history of § 1322(b)(2), which reveals that the favorable treatment of residential lenders was intended to encourage the flow of capital into the home lending market. *Id.* 508 U.S. at 332, 113 S.Ct. at 2111-12. Essentially, then, Congress intended for § 1322(b)(2) to trump § 506(a) with respect to homestead liens.

In the case at bar, unlike *Nobelman*, where the secured creditor had at least a partially secured claim, AG's lien is wholly unsecured, because the debtors have no equity in the subject property over and above the amount of FHA's mortgage. *Nobelman* did not address this situation. Since *Nobelman*, numerous bankruptcy courts have reached opposite conclusions regarding whether *Nobelman's* prohibition of stripping homestead liens applies to a wholly unsecured mortgage.

The majority view is that § 1322(b)(2) does not apply to holders of totally unsecured claims. *See e.g.*, ***In re Johnson***, 226 B.R. 364 (Bankr.D.Md.1998); ***In re Cerminaro***, 220 B.R. 518 (Bankr.N.D.N.Y.1998); ***In re Yi***, 219 B.R. 394 (Bankr.E.D.Va.1998); ***In re Bivvins***, 216 B.R. 622 (Bankr.E.D.Tenn.1997); ***In re Scheuer***, 213 B.R. 415 (Bankr.N.D.N.Y.1997); ***In re Cervelli***, 213 B.R. 900 (Bankr.D.N.J.1997); ***In re Lam***, 211 B.R. 36 (9th Cir. BAP

1997); *In re Geyer*, 203 B.R. 726 (Bankr.S.D.Cal.1996); *In re Geyer*, 203 B.R. 726 (Bankr.S.D.Cal.1996); *In re Sanders*, 202 B.R. 986 (Bankr.D.Neb.1996); *In re Purdue*, 187 B.R. 188 (Bankr.S.D.Ohio 1995); *In re Wright*, 178 B.R. 703 (Bankr.E.D.Va.1995); *In re Castellanos*, 178 B.R. 393 (Bankr.M.D.Penn.1994); *In re Mitchell*, 177 B.R. 900 (Bankr.E.D.Missouri 1994); *In re Lee*, 177 B.R. 715 (Bankr.N.D.Ala.1995); *In re Thomas*, 177 B.R. 750 (Bankr.S.D.Ga.1995); *In re Woodhouse*, 172 B.R. 1 (Bankr.D.R.I.1994); *In re Sette*, 164 B.R. 453 (Bankr.E.D.N.Y.1994); *In re Lee*, 161 B.R. 271 (Bankr.W.D.Okla.1993); *In re Kidd*, 161 B.R. 769 (Bankr.E.D.N.C.1993); *In re Williams*, 161 B.R. 27 (Bankr.E.D.Ky.1993); *In re Hornes*, 160 B.R. 709 (Bankr.D.Conn.1993); *In re Plouffe*, 157 B.R. 198 (Bankr.D.Conn.1993). The courts in favor of allowing modification of an unsecured mortgage rely on *Nobelman's* statement that it is appropriate to look to § 506(a) for valuation of the collateral to determine the status of the creditor's claim. 508 U.S. at 328-29, 113 S.Ct. at 2106. These courts have interpreted this language to mean that they must first determine whether the creditor's claim is secured or unsecured according to § 506(a). If the claim is unsecured, then the protections of § 1322(b)(2) do not apply and the debtor may strip the lien. These courts focus on the distinction between the creditor's partially secured claim in *Nobelman* and the wholly unsecured claims of the debtors before them. This is the view that Judge Hershner adopted and the rationale on which the debtors rely in this appeal.

The minority view is that homestead lienholders' rights may not be stripped, even if their claims are wholly

unsecured. *See e.g.*, ***In re Tanner***, 223 B.R. 379 (Bankr.M.D.Fla.1998); ***In re Lewandowski***, 219 B.R. 99 (Bankr.W.D.Penn.1998); ***In re Bauler***, 215 B.R. 628 (Bankr.D.N.M.1997); ***In re Shandrew***, 210 B.R. 829 (Bankr.E.D.Cal.1997); ***In re Fraize***, 208 B.R. 311 (Bankr.D.N.H.1997); ***In re Barnes***, 207 B.R. 588 (Bankr.N.D.Ill.1997); ***In re Barnes***, 199 B.R. 256 (Bankr.W.D.N.Y.1996); ***In re Neverla***, 194 B.R. 547 (Bankr.W.D.N.Y.1996); ***In re Johnson***, 160 B.R. 800 (Bankr.S.D.Ohio 1993). These courts place emphasis on the existence of a lien rather than the value of the property which is the subject of the lien. They rely on *Nobelman's* holding that the term "claim" as used in § 1322(b)(2) encompasses the right to payment, whether secured or unsecured. 508 U.S. at 331, 113 S.Ct. at 2111. This is the view on which AG relies in this appeal.

The Eleventh Circuit has not addressed the conflicting applications of *Nobelman* and § 1322(b)(2), and there is a split of authority among the bankruptcy courts in the Eleventh Circuit. Two leading bankruptcy treatises also take opposing views. *See* Lundin, Keith M., Chapter 13 Bankruptcy, 2nd Edition, § 4.46, p. 4-56 (concluding that the protection of § 1322(b)(2) extends to the wholly unsecured lienholder); 5 Collier on Bankruptcy, § 1322.06[1][a] at 1322-16 (L. King 15th Ed.) (adopting view that if a lien is completely unsecured, then it is not protected by § 1322(b)(2)). Since there is no binding authority on the issue and since this Court reviews issues of law *de novo*, this Court must choose between the two conflicting views. The Court sides with the line of authority prohibiting modification of liens secured only by the debtor's principal residence regardless of whether

the claim is wholly unsecured, because the Court finds that this position is compelled by *Nobelman* and that it is the more reasoned approach.

It is clear from *Nobelman* and the language in the statute itself that Congress intended § 1332(b)(2) to protect all claims which are secured only by a lien on the debtor's principal residence. Section 1322(b)(2) states that a bankruptcy plan may "modify the rights of holders of secured claims, other than *a claim secured only by* a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims. . . . " 11 U.S.C. § 1322(b)(2) (emphasis added). As the *Nobelman* Court found, in the clause prohibiting modification of homestead liens, Congress could have repeated the term of art "secured claim," but it chose to use the phrase "a claim secured . . . by" instead. The chosen language does not specify that the claim must be secured by a certain level of equity in the underlying collateral. Rather, the only requirement is that the claim is secured by the debtor's principal residence. Thus, the emphasis in the statute is on the fact that a lien exists on the property, not the value of such property.

Because Congress used both the phrases "holders of secured claims" and "holders of unsecured claims" in § 1322(b)(2) but placed the clause prohibiting the modification of homestead liens after the phrase "holders of secured claims" only, it certainly is reasonable to infer that Congress intended to protect only secured claims from lien stripping. However, the Supreme Court rejected this very argument in *Nobelman*. All criticism of *Nobelman* aside, the Supreme Court's holding is clear that § 1322(b)(2)'s protection applies to all claims secured only

by the debtor's principal residence, whether they are secured or unsecured. Therefore, its protection applies to AG's claim in the case at bar, even though it would be considered unsecured under a § 506(a) valuation.

This result is logical. Under the majority view, if the remaining value of the subject property (after accounting for the senior lienholder's claim) is merely one cent more than the amount of the junior mortgage, then the junior creditor would be deemed secured and thus protected under § 1322(b)(2), while those junior mortgagees who lack that penny of equity would have their claims stripped. This would place too much emphasis on the valuation process, which is inexact and is subject to fluctuations in the market. Such a result is contrary to *Nobelman*, because there, the Supreme Court did not require any level of equity for § 1322(b)(2) protection.

Moreover, the majority view does not recognize that the existence of a lien carries any rights if the lien is unsecured. This view essentially holds that if a lien has no security to support it, the rights afforded a lienholder are meaningless, because a forced sale would not result in any financial gain to the lienholder. While this view is legitimate, it completely ignores *Nobelman's* emphasis on the existence of a lien rather than the presence of value in the property supporting the lien. *Nobelman*, 508 U.S. at 329-31, 113 S.Ct. at 2110-11. The *Nobelman* Court recognized that the rights given to the holder of a lien by a mortgage contract and state law are important in and of themselves, without regard to the value of the collateral used to secure those rights. *Id.* And, the Supreme Court does not think that those rights should be displaced by the Bankruptcy Code absent an indication to that effect

by Congress. *Id.* It may seem unfair that a creditor that normally would not have an allowable secured claim under § 506(a) would be protected from lien stripping under § 1322(b)(2); but, according to *Nobelman*, Congress's intent in passing § 1322(b)(2) was to give homestead lienholders something that they otherwise would not be entitled to under § 506(a).

For the foregoing reasons, the Court hereby adopts the view espoused by the bankruptcy courts that hold that § 1322(b)(2)'s protection applies to a claim secured only by a lien on the debtor's primary residence regardless of whether such lien would be secured or unsecured under § 506(a). Under the facts now before the Court, AG would qualify for such protection. Accordingly, to the extent that the Bankruptcy Court held otherwise, such decision is hereby **REVERSED** and the case is hereby **REMANDED** for proceedings consistent with this Order.

SO ORDERED, this 27 day of January, 1999.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	: Chapter 13
TYRONE H. DICKERSON DARLENE H. DICKERSON,	:
Debtors	: Case No. 96-53997 RFH
TYRONE H. DICKERSON DARLENE H. DICKERSON,	:
Plaintiffs	: (Filed Aug. 29, 1997)
vs.	:
AMERICAN GENERAL FINANCE, INC.,	: Adversary Proceeding : No. 97-5013
Defendant	:

ORDER

Based upon the opinion published in open court on the 29th day of August, 1997; it is

ORDERED that the lien of American General Finance, Inc., Defendant, on the residence of Tyrone H. Dickerson and Darlene H. Dickerson, Plaintiffs, may be modified through Debtor's Chapter 13 plan.

SO ORDERED this 29th day of August, 1997.

/s/ Robert F. Hershner, Jr.
ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy
Court

APPENDIX

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF GEORGIA MACON DIVISION

In Re	:	CASE NO. 96-53997-RFH
TYRONE H. DICKERSON AND DARLENE H. DICKERSON,	:	
Debtor(s)	:	CHAPTER 13
TYRONE H. DICKERSON AND DARLENE H. DICKERSON,	:	ADVERSARY PROCEEDING NO. 97-5013
Plaintiffs	:	
vs.	:	
AMERICAN GENERAL,	:	
Defendant	:	

PRE-TRIAL STIPULATION

COMES NOW, the parties to the above-captioned Adversary Proceeding, and file this, their pre-trial stipulation, and jointly show as follows:

I. STATEMENT CONCERNING SETTLEMENT: The parties have met and conferred in an attempt to settle the issues raised in this proceeding. The possibility of settlement is remote.

II. STIPULATION OF MATERIAL FACTS: The parties do hereby, by and through their counsel of record whose signatures appear below, hereby stipulate that the following facts shall be admitted as facts without objection upon the trial of this case:

1.

The parties are subject to the jurisdiction of this court. This is a core proceeding which is subject to the venue and jurisdiction of this Court. 11 U.S.C. Section 1334, 11 U.S.C. Section 502, 11 U.S.C. Section 506, 11 U.S.C. Section 1332 and 26 U.S.C. Section 1409.

2.

On or about June 21, 1985, the debtors purchased real estate known as 50 Fallin Street, Thomaston, Georgia 30286. The property has been utilized as the debtor's personal residence since June 21, 1985.

3.

Financing of the home was provided by Rural Development, formerly known as Farmers Home Administration, in the amount of $38,150.00. Rural Development holds a first mortgage on the property by virtue of a security deed dated June 21, 1985. Said deed is recorded in Deed Book 310, Page 503, Upson County Superior Court and attached hereto as Exhibit "1".

4.

The debtors signed a promissory note in favor of Rural Development on June 21, 1985 for the principal amount of $38,150.00. A copy of said note is attached hereto as Exhibit "2". The debtors have maintained timely payments in the amount set by Rural Development since June 21, 1985.

5.

On February 22, 1996, the debtors applied for credit with American General Finance and submitted a loan application to American General indicating that Rural Development held a first mortgage on their personal residence. A copy of the debtors loan application is attached hereto as Exhibit "3".

6.

On February 22, 1996, Rural Development indicated that the payoff on the first mortgage was $14,558. Based on the payoff figure of $14,556, American General advanced $20,000.00 to the debtors. The debtors signed a note promising to repay the amounts advanced by American General. A copy of said note is attached hereo [sic] as Exhibit "4".

7.

The contract between American General and the debtors called for 180 monthly payments of $309.09. The final payment date under the contract is February 22, 2011.

8.

As collateral for the advance, the debtors granted American General a security interest in their personal residence located at 50 Fallin Street, Thomaston, Georgia 30286. American General perfected its security interest in the debtor's residence by filing a deed to secure debt recorded in Deed Book 526, Page 240, Upson County

Superior Court. Said deed is attached hereto as Exhibit "5".

9.

At the time of the loan, American General obtained an appraisal of the debtor's personal residence valuing the property at $54,000. A copy of said appraisal is attached hereto as Exhibit "6".

10.

The debtors filed for relief under 11 U.S.C. Chapter 13 on September 27, 1996. At the time of the filing, the debtors were current with their payments to both Rural Development and to American General Finance.

11.

The debtors' Chapter 13 plan proposed to make the regular monthly payments to both Rural Development and American General outside of their Chapter 13 plan. A copy of the debtors' Chapter 13 plan is attached hereto as Exhibit "7".

12.

On October 31, 1996, Rural Development filed a Proof of Claim in the above referenced Bankruptcy Case in the amount of $59,889.74, which claim is the subject to Defendant's objection to allowance, included herein. A copy of said Proof of Claim is attached hereto as Exhibit "8".

13.

On November 13, 1996, American General Finance filed a Proof of Claim in the amount of $21,432.06. A copy of said claim is attached hereto as Exhibit "9".

14.

An order of confirmation was entered by this Court on December 19, 1996. Plaintiffs filed this action on January 31, 1997.

III. BRIEF STATEMENT OF THE CASE: This is a Complaint to Determine Validity, Priority and Extent of the Lien held by American General on the debtors' personal residence. The debtors contend that no equity exists in the debtors' residence for American General's lien to attach and that American General is an unsecured creditor. American General contends that it is a fully secured creditor by virtue of equity in the debtors' personal residence and relevant federal and state laws. The parties are also in agreement that the dispositive issues are governed by federal and Georgia laws.

IV. STATEMENTS BY EACH PARTY OF THOSE FACTUAL MATTERS UPON WHICH IT RELIES, BUT WHICH ARE IN DISPUTE.

The plaintiffs contend that Rural Developments was owed $52,435 and subsidies at the time of the bankruptcy filing. Defendant American General Finance disputes the amount owed to Rural Development due to the fact it obtained a payoff from Rural Development in the amount of $14,558 less than eight (8) months prior to the debtors' filing. Further American General asserts that Rural

Development's claim includes monies, fees and unearned interest to which it is not entitled.

The Plaintiffs also contend that the value of their personal residence at the time of filing was $43,500. Defendant contends the property to be worth at least $56,000.

V. STATEMENT OF LEGAL POSITIONS OF THE PARTIES AND CITATION OF AUTHORITY:

(1) For the Plaintiffs:

Plaintiffs contend that American General's claim should be treated as unsecured for purposes of the debtor's bankruptcy proceeding. Rural Development holds a first lien on the debtors' personal residence in the approximate amount of $52,435 plus subsidies due. The fair market value of the residence is $43,500. No equity exists in the debtors' residence for American General's lien to attach. Therefore, American General has no right as a holder of a secured claim entitled to protection under 11 U.S.C. Section 1322(b)(2).

Plaintiffs also contend that they were not given a written notice of their right of rescission at the time of closing with American General as required by 15 U.S.C. Section 1635(a)(b). Plaintiffs therefore exercise their right of rescission. Said rescission results in American General having an unsecured claim. Plaintiffs further are entitled to penalties against American General under 15 U.S.C. Section 1640 (a)(2)(A)(I) and attorney's fees under 15 U.S.C. Section 1640(a)(3) for failing to provide Plaintiffs notice of their right of rescission.

(2) For the Defendant:

Defendant American General Finance is the holder of a fully secured claim in the Amount of $21,432.06 secured by the debtors' personal residence. The claim asserted by Rural Development contains monies, fees and unearned interest to which Rural Development is not entitled. Rural Development includes in its proof of claim $24,552 in interest credit granted that is subject to recapture pursuant to 42 U.S.C. Section 1490(a)(1)(D). Additionally, its claim includes $4,417.16 which it claims as a principal reduction attributed to subsidy. Rural Development is not entitled to these amounts. 42 U.S.C. Section 1409(1)(D)(I) provides:

> With respect to borrowers under section 1472 or 1487 (a) of this title who have received assistance under subparagraph (B) or (C), the Secretary shall provide for the recapture of all or a portion of such assistance rendered upon the dispositoin or nonoccupancy of the property by the borrower. In providing for such recapture, the Secretary shall make provisions to provide incentives for the borrower to maintain the property in a marketable condition.

While Rural Development would be entitled to recapture fees if the debtors abandoned the property, it is not entitled to recapture at this point. The section specifically provides that recapture is available only upon the disposition or nonoccupancy of the property by the borrower. In this case, the debtors are still residing in the property. Therefore, the claim of Rural Development includes $28,969.16 to which it is not entitled.

Further, the principal balance owed to Rural Development at the time of the loan in 1985 was $38,150.00.

American General obtained a payoff of $14,558 from Rural Development of 1996. It is inconceivable that Rural Development can now claim a debt in the amount of $59,889.74. American General contends that Rural Development's claim should be reduced to at least $30,920.58 to deduct the recapture fees to which it is not entitled.

American General contends the value of the debtors' personal residence is at least $56,000. Rural Development's claim should only be allowed to the extent of $30,920.58. Therefore, substantial equity exists in the debtors' residence whereby American General should be treated as a fully secured creditor and retain its lien.

The Plaintiffs are prohibited from stripping Defendant's lien on the debtors' personal residence regardless of the equity in the debtors' residence. A Chapter 13 plan may "modify the rights of holders of secured claim, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. Section 1322(b)(2). It is the existence of a mortgage lien which determines the application of Section 1322(b)(2), and not the value of the collateral subject to that lien. A "strip down" of a lien is not available to property occuppied as the debtor's principal residence.

Congress, in drafting Section 1322(b)(2), intended to provide a more favorable treatment to residential mortgagees than to the holders of security interest in other assets of a Chapter 13 debtor. Section 1322's protection focuses on the rights of the lender. The determination of property rights in estate assets is determined by state law. American General's "rights" therefore, are reflected in the relevant mortgage instruments, which are enforceable

under Georgia law. Those rights include, among others, the right to repayment of the principal in monthly installments over a fixed term at specified adjustable interest rates which is protected from modification under Section 1322(b)(2). The debtors, therefore, cannot modify the rights of American General's claim.

Plaintiffs allegation that American General failed to provide their three day right of rescission has no merit. Plaintiffs executed a Notice of Right to Cancel on February 22, 1996 as shown by Exhibit "10" attached hereto. The notice specifically allowed the Plaintiffs until February 27, 1996 to cancel the transaction. Defendant has therefore not violated any provision of 15 U.S.C. Section 1640 and Plaintiffs' allegations are without merit.

The debtors' action is barred by res judicata and relevant bankruptcy law. "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. Section 1327(a). The confirmation order in the debtors' case was entered by this Court on December 19, 1996. The debtors' confirmed Chapter 13 plan provided that the debt to American General would be treated as a fully secured, long term debt to be paid directly by the debtors. This action was not filed until January 31, 1997. The debtors are bound by the provisions of their confirmed Chapter 13 plan and this action is therefore barred by 11 U.S.C. Section 1327(a).

Finally, service of Plaintiffs' complaint was improper. American General Finance is a corporation which maintains a registered servicing agent in the State of Georgia. Its registered servicing agent is C.T. Corporation Systems located in Atlanta, Georgia. Service of Plaintiff's complaint was made by mailing a copy of same to American General's office in Thomaston, Georgia. Plaintiffs' complaint should therefore be dismissed for improper service.

Based on the foregoing reasons, the debtors are barred by both bankruptcy law and applicable state law from avoiding the lien held by American General on their personal residence. American General is a fully secured creditor and should be treated as such in the debtors' Chapter 13 bankruptcy.

VI. A LIST OF PENDING MOTION REQUIRING RESOLUTION PRIOR TO TRIAL: None. However, there is a pending Motion to Relieve Stay filed by Defendant American General Finance scheduled for August 28, 1997.

VII. A LIST OF THE NAMES AND ADDRESSES OF ALL WITNESSES WHICH SHALL BE CALLED, AND MAY BE CALLED, INCLUDING EXPERT WITNESSES. ANY OBJECTION TO EXPERT WITNESS SHALL BE SEPARATELY SET FORTH:

(1) For the Plaintiff: Tyrone Dickerson, Darlene Dickerson, Charles Adkins, Dane Brahbam

(2) For the Defendant: Glenda Smith, Robert Wainwright, Ben W. Rapillard.

VIII. A LIST OF ALL EXHIBITS WHICH ARE PROPOSED FOR ADMISSION. ANY EXHIBIT WHICH IS SUBJECT TO OBJECTION SHALL BE SO IDENTIFIED. ANY SUCH OBJECTION SHALL BE BRIEFLY SUMMARIZED BY THE OPPOSING PARTY WITH CITATIONS OF AUTHORITY.

(1) The following documents may be admitted into evidence without objection:

Exhibit No.	Description
1	Deed to Secure Debt to FHA
2	Note in favor of FHA
3	Loan application to American General
4	Note in favor of American General
5	Deed to Secure Debt to American General
6	Appraisal dated Feb. 7, 1996
7	Debtors' Chapter 13 plan
8	Proof of claim filed by Rural Development
9	Proof of claim filed by American General
10	Notice of right of rescission
11	Property owner's affidvit
12	Loan application dated 6/21/95
13	Loan application dated 6/20/96
14	Reamoritization of Rural Development
15	Appraisal dated March 7, 1997
16	Waiver of Borrowers Rights
17	Subsidy Repayment Agreement
18	Rural Development's Statement of Account

VII. JOINT STATEMENT OF AMOUNT OF TIME NECESSARY FOR THE TRIAL OF THE CASE:

The parties estimate that the trial of this case will take one-half day.

Respectfully submitted, stipulated and agreed to this 25th day of Agugust, 1997.

/s/ Don E. Snow
Don E. Snow
Attorney for Debtors
P.O. Box 12
Thomaston, GA 30286
(706) 647-1722

/s/ John R. Davis, Jr.
John R. Davis, Jr.
Attorney for Defendant
560 First Street
Macon, GA 31201
(912) 746-4204

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE: DICKERSON vs. AMERICAN GENERAL FINANCE, INC.
CASE NO. 96-53997
ADVERSARY NO. 97-5013

MACON, GEORGIA
AUGUST 27 AND 29, 1997

TRANSCRIPT OF COMPLAINT TO DETERMINE VALIDITY, PRIORITY AND EXTENT OF LIEN; ORAL DECISION

BEFORE THE HONORABLE ROBERT F. HERSHNER, JR.
UNITED STATES BANKRUPTCY JUDGE

* * *

[114] (Proceedings on August 29, 1997 began at 2:36 p.m. as follows:)

THE COURT: Be seated, please. Reconvening on adversary proceeding number 97-5013. I've carefully considered the evidence presented to me, and I've reviewed the applicable law, and I stand ready at this time to publish my decision.

Tyrone Dickerson and Darlene Dickerson, debtors, filed for relief under Chapter 13 of the Bankruptcy Code on September 27, 1996. Debtors' Chapter 13 plan was confirmed by the Court on January 23, 1997. Debtors' confirmed plan provides that the debtors will be their own disbursing agent on their obligation to American General Finance. In this adversary proceeding debtors asked the Court to rule that their obligation to American

General is an unsecured obligation. American General asserts that it is secured by a second lien on the debtors' residence.

Now, it is undisputed that the Farmers Home Administration, now known as the Rural Economic and Community Development, holds the first lien on debtors' residence. Debtors first assert that the Court's order of confirmation is determinative and that it finds American General's second lien to be unsecured. This is not correct. The order of confirmation provides that debtors will be disbursing their payments to American General. It does not address the character of the obligation owed to American General.

[115] Next debtors assert that they may rescind their obligation to American General because they did not receive the required notice of their right to rescind as required by *15 U.S.C., Section 1635.* The evidence is in dispute on this issue. Debtors acknowledge that they were told about the right and that they signed the right of rescission form. Debtors testified that the rescission form was not in their personal papers. American General's agent who handled the closing testified that she explained the right of rescission to the debtors, that she saw them sign the form, and that she gave to debtors copies of the form.

Now, the Court, noting the rebuttable presumption created by *15 U.S.C., Section 1635(c)* and having considered the weight of the evidence, is persuaded that debtors did receive the required notice of rescission. American General's second lien came into existence on February 22, 1996, when the loan transaction at issue was

closed. It is undisputed that Farmers Home held a first lien on the residence when American General's loan was closed.

Debtors assert that there was no value in their residence to secure the second lien. Debtors assert that their obligation to Farmers Home was greater than the fair market value of their residence. Debtors assert that accordingly American General's claim is unsecured in their Chapter 13 case and that they may, therefore, modify American General's claim [116] since it is not entitled to the protection of *11 U.S.C., Section 1322(b)(2).*

The Farmers Home filed a proof of claim in debtors' Chapter 13 case which is dated September 27, 1996. Proof of claim asserts a secured claim totaling $59,889. The loan of the Farmers Home to debtors is a subsidized loan under the provisions of *42 U.S.C., Section 1490.* The Court would note that American General, when it made its loan to debtors on February 22, 1996, obviously did not understand the obligation which debtors owed to the Farmers Home.

Debtors' loan from the Farmers Home was a government-subsidized loan. The Farmers Home, from the evidence presented, has been subsidizing the loan since the Farmers Home made the loan to debtors in 1985. The evidence discloses that at the time American General made its loan to debtor February 1996 the government was subsidizing the loan to debtors at about $200 per month. Debtors' loan from the Farmers Home has actually been increasing in size because of this subsidizing.

Now, the proof of claim filed by Farmers Home, having been reviewed by the Court – and the Court

having reviewed the applicable law, *42 U.S.C., Section 1490* – the Court is persuaded that the proof of claim filed by Farmers Home is accurate and that it does reflect the obligation owed by debtors to the Farmers Home on September 27, 1996.

Now, American General's loan to debtor was made seven [117] months before the date of the proof of claim. Since debtors' loan to Farmers Home was being subsidized at the rate of $200 per month, the Court from the evidence concludes that in February of 1996 debtors owed Farmers Home a sum in excess of $57,000.

Now, the Court heard testimony as to the value of the debtors' residence. Under the evidence, the highest possible value that debtors' residence could have is $56,000. Thus, under the evidence presented, in February of 1996, when American General took a secured lien on debtors' residence, there was no value in the residence to secure its second lien. Since debtors' obligation to Farmers Home has increased since February 1996, the Court must find that American General has an unsecured claim in debtors' Chapter 13 case.

Now, debtors in their complaint assert that American General is not entitled to the protection afforded under *Section 1322(b)(2)* to the holder of a secured claim that is secured only by a lien on the debtors' principal residence. American General argues that the United States Supreme Court's decision Nobleman v. American Savings Bank, *508 U.S. 324* – a 1993 decision – prevents the debtors from modifying its rights.

Now, in Nobleman the Supreme Court concluded that *Section 1322(b)(2)* prohibits a Chapter 13 debtor from – excuse me – we'll strike that and start again.

[118] American General argues that the United States Supreme Court's decision in Nobleman v. American Savings Bank, *508 U.S. 324*, prevents debtors from modifying its rights. In Nobleman the Supreme Court concluded that *Section 1322(b)(2)* prohibits a Chapter 13 debtor from relying on *Section 506(a)* to reduce an undersecured homestead mortgage to fair market value of the mortgaged residence, *508 U.S.* at page 322 and 26.

Now, Collier on Bankruptcy, a recognized treatise in the area of bankruptcy, states:

> "The Nobleman opinion strongly suggests, however, that if a lien is completely undersecured there would be a different result. The opinion relies on the fact that, even after bifurcation, the creditor in the case was still the holder of a secured claim because petitioner's home retained $23,000 of value as collateral. If the creditor had held a lien on property that had no value, perhaps because the property was fully encumbered by a prior lien, then under this analysis the creditor would not have been a holder of a secured claim entitled to the protection of *Section 1322(b)(2)*. Thus, since Nobleman, such completely undersecured claims have been found to be modifiable under *Section 1322(b)(2)*, citing A. Collier on Bankruptcy, Section 1322.06, 15th revised edition, 1997."

[119] The Court notes that the Bankruptcy Court for the Southern District of Georgia has held that a wholly unsecured second mortgage is not protected by *Section*

1322(b)(2) or by Nobleman, citing Norwest Financial Georgia, Inc. v. Thomas, *177 Bankruptcy 750.*

In In Re: Lee, *177 Bankruptcy 715,* bankruptcy decision from the Northern District of Alabama, 1995, the Bankruptcy Court for the Northern District of Alabama held that *Section 1322(b)(2)* did not prevent the modification of the rights of the wholly unsecured junior mortgage holder. The Court notes that the junior mortgage holder in that case was, in fact, American General.

Now, the Court notes that a majority of courts have considered the issue and hold that a wholly unsecured lien is not protected from modification by *Section 1322(b)(2)* or by Nobleman. Accordingly, the Court concludes that American General's second lien on debtors' residence may be modified in debtors' Chapter 13 case. I'll enter an order accordingly. Court's in recess.

(Proceedings concluded at 2:48 p.m.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8184

(Filed Nov. 17, 2000)

In Re: TYRONE H. DICKERSON and
DARLENE H. DICKERSON,

Debtor.

AMERICAN GENERAL FINANCE, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

TYRONE H. DICKERSON and
DARLENE H. DICKERSON,

Defendants-Appellants,
Cross-Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: BIRCH, RONEY and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE